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IN THE

Supreme Court of the United States

October Term, 1941.

No. [redacted] 19

PHOENIX FINANCE CORPORATION, a Corporation of the State of Delaware,

Petitioner,

v.

IOWA-WISCONSIN BRIDGE COMPANY, a Corporation of the State of Delaware,

Respondent.

Petitioner's Reply to Respondent's Supplemental Brief.

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PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

PRELIMINARY STATEMENT.

Although respondent has denominated its last document in this case as a "Supplemental Brief," the same is in fact an attempt to reply to petitioner's reply brief herein.

It is with great reluctance that petitioner files this reply to respondent's so-called "Supplemental Brief." It is realized that the Court has been and is being unnecessarily burdened with factual disputes not germane to the legal questions *sub judice.* Petitioner in its principal brief sought to avoid unnecessary extension of its argument in this respect.

Thus petitioner in its statement (Petitioner's Brief pp. 54-55) dealt with its secondary or alternative contention

that in a *supplemental* proceeding seeking *supplemental* relief of the character before the court, one of the *issues of fact* is whether the former decree was a "right" one. It was pointed out that the question before this court, however, is *one of law*, viz., whether the District Court should have permitted petitioner to present its defense in that respect and to offer evidence in support thereof. The petitioner recognized that the facts involved upon such a reopening of the case are not properly before this court, and with respect thereto petitioner said (Petitioner's Brief pp. 54-55):

> "A discussion as to what those facts are specifically and what detailed evidence is available to prove or disprove the same has no place on this writ of certiorari. *The point is that under 'Lord Redesdale's Rule,' the defendant in the Supplemental and Ancillary Cause should have been permitted to show that the decree of December 1, 1936 was not 'right.'*"

Respondent's brief, on the contrary, dealt with those facts as though the same were matters of principal importance for this court to pass upon. This of necessity forced petitioner, out of a proper regard for accuracy and justice to itself, to reply to factual statements by respondent demonstrably erroneous from the record.

To that reply, respondent has now by its "Supplemental Brief" attempted a rebuttal, and again petitioner finds itself faced with statements of fact by the respondent which, though not deemed material to the *legal issues* now before this court, cannot be permitted to pass unchallenged.

For purpose of emphasis, petitioner quotes the following from its Reply Brief (pp. 4-5):

"There are but the two following basic questions of law before the the Supreme Court:

(1) *Was the decree in the Foreclosure Cause such an adjudication against Phoenix Finance Corporation as to the issues in the several Delaware cases as to be entitled to 'full faith and credit?'*

(2) *Assuming such adjudication, was Phoenix Finance Corporation as the defendant in a Supplemental and Ancillary Bill to implement and enlarge that decree, entitled to challenge the same as 'wrong' under 'Lord Redesdale's Rule'?*

In the following (1) is referred to as Petitioner's 'primary' contention and (2) as Petitioner's 'alternative' or 'secondary' contention. All other questions discussed in petitioner's brief relate to integral parts of, or offshots from, these two fundamental questions. With respect to the alternative contention, *supra*, petitioner contends that it is entitled to challenge any purported finding of fact in the Foreclosure Cause which is not supported by competent evidence or is otherwise 'wrong.' Consequently, the petitioner with respect to the challenged findings in the Foreclosure Cause has stated what it earnestly and sincerely believes the facts to be and has given proper record references in support thereof. Furthermore the petitioner fortified its challenge in this respect by tenders of evidence (R. 192-223, 238, 250, 272-292). All such tenders were rejected by the Court (R. 223-224, 256, 257, 287, 288, 289, 290)."

FURTHER INACCURATE, INCOMPLETE OR MISLEADING STATEMENTS OF FACT AND INFERENCE IN RESPONDENT'S "SUPPLEMENTAL" BRIEF.

THE PARTICIPATION OF PHOENIX IN THE TRIAL OF THE FORECLOSURE CASE.

Respondent's supplemental brief (p. 4) charges the petitioner with "the repeated statement" that it "did not participate in the trial and did not request and instigate the foreclosure action * * * ." This is an obvious misstatement of petitioner's position and is not justified by anything appearing in either of petitioner's briefs. It is and at all times has been petitioner's earnest contention based upon the record, that it did not participate in any way in the trial of the Foreclosure Cause. On the other hand, in its principal brief (pp. 5-6), petitioner fully disclosed the facts with respect to its status as a bondholder holding more than 25% of the outstanding bonds, the provisions of the indenture with respect thereto, its request of the trustee for mortgage foreclosure and its agreement to secure and indemnify the trustee against costs and expenses in the proposed action.

References in the Master's Report.

On page 6 of respondent's supplemental brief, the respondent assails the statement by petitioner on page 31 of its reply brief, with respect to a finding by the Master, that "there is not a single record reference thus given by the Master which supports those findings." The attempted explanation of the respondent is that the Master's references have to do with the original depositions, transcripts,

books and exhibits in evidence and not to the pages of the printed record. However, the record has since been printed and is before this Court. If the respondent were being fair with the Court in its contention in this regard, it would have pointed out any comparable references from the *printed* record to corroborate the Master's references *if, in fact, any such references appear.* It is the petitioner's position that no record evidence exists to support the particular findings. Obviously the petitioner is not in a position to cite record references to prove the negative. Respondent, however, could readily establish the affirmative of its position in this regard *if any proper references appeared in the record.* The absence of any such citations is the strongest possible argument to support petitioner's position.

The $20,100 of bonds as collateral security for obligations originating with Phoenix Finance Corporation.

On page 8 of the respondent's supplemental brief, an attack is made upon petitioner's assertion on page 12 of its reply brief that no record references are given to support the statement of respondent that the $20,100 of Bridge Company bonds were given "as collateral security for the payment of obligations *originating with Phoenix Finance System, Inc.* * * *" Respondent's comments on this point indicate either a failure to grasp the point intended or, as is suspected, a specious pretense to induce further confusion. As pointed out by petitioner (petitioner's reply brief p. 12), these bonds were issued to Phoenix Finance Corporation as collateral security only for obligations *originating solely with Phoenix Finance Corporation* (F. R. 542, 1028). None of the references either in the respondent's

original brief or in the second paragraph on page 8 of the supplemental brief have any bearing directly or indirectly upon the factual issue thus disputed.

John A. Thompson, a witness in the Foreclosure Cause on behalf of the intervener, the Respondent, the Trustees-Complainants, but not for Phoenix (petitioner).

F. R. 538 cited by the respondent in its supplemental brief at p. 9 shows that John A. Thompson was called for direct examination by Rex H. Fowler. F. R. 531, also cited by the respondent on the same page, discloses the appearances at that particular hearing and indicates that C. S. Bradshaw and Rex H. Fowler of Des Moines appeared as attorneys for the complainants-trustees, First Trust & Savings Bank and A. H. Schubert. At F. R. 414 *et seq.*, John A. Thompson gave a deposition as a witness called on behalf of Fayette D. Kendrick, Intervener. As heretofore pointed out, this deposition was never offered in evidence and is in the record for a limited purpose only (petitioner's Reply Brief pp. 22-23). Mr. Thompson was cross-examined as an intervener's witness by respondent's counsel (F. R. 562 *et seq.*, F. R. 633). At another point, Mr. Thompson was called as a witness on behalf of the respondent (F. R. 651). At F. R. 673 and F. R. 691, Mr. Thompson was called for cross-examination by counsel for the intervener.

The position the petitioner has consistently taken is that Mr. Thompson at no time testified as a witness on behalf of Phoenix Finance Corporation nor did Phoenix Finance Corporation offer any evidence of any character in the trial of the Foreclosure Cause. At pp. 9 and 10 of respondent's supplemental brief, the obvious interference is that Mr. Thompson was a witness for petitioner and that

petitioner, therefore, participated in the trial. As heretofore pointed out, (Petitioner's Brief pp. 17-21) such is not the fact.[1]

The Alleged Non-production of Books and Records by Phoenix Finance Corporation.

Respondent in its Supplemental Brief at pages 9, 10, 27 and 29 persists in a studied effort to support its erroneous and deliberately misleading contention that petitioner disobeyed some court order in the Foreclosure Cause to produce books. This matter has been dealt with comprehensively in Petitioner's Brief at pages 46-52 and in Petitioner's Reply Brief at pages 14-18. Nowhere in Respondent's principal or Supplemental Brief has Respondent been fair enough to concede the unassailable fact that the only order involved is that of April 24, 1934 (F. R. 98) which directed *Phoenix Finance Corporation* to produce certain of *its books at its office in Des Moines, Iowa, within ten days from the date of said order.* No other order was made and no formal demand for the production of Phoenix Finance Corporation's books with or without supporting order was made at any time during the trial of the Foreclosure Cause (no record reference to prove the contrary).[2]

[1] The tacit recognition by respondent of petitioner's non-participation as an actual party is also evidenced by its motion to strike Phoenix's petition for modification of the decree in the Foreclosure Cause (F. R. 392) on the ground, *inter alia*, that "Phoenix Finance Corporation is represented in this case by the * * * trustees, who are indispensable parties in charge of the litigation, and said Phoenix Finance Corporation is not entitled to file a separate petition for rehearing."

[2] At page 147 of the transcript of hearing before the Master at Des Moines commencing July 15, 1935, the Master with respect to certain books of Phoenix Finance System, Inc., and Phoenix Finance Corporation said:

After Phoenix Finance Corporation had been fully exonerated on one charge of the same character (F. R. 106) on January 5, 1935 (F. R. 108, 109), the case proceeded to hearing before the Master in July, 1935 (F. R. 115), followed on March 10, 1936 (F. R. 138) by the Master's findings and conclusions, on June 13, 1936, by hearings on exceptions before the District Court (F. R. 203), and culminating in the decree of December 1, 1936 (F. R. 202). After December 4, 1934, when the charge was originally made (F. R. 106), no formal accusations calling for a denial were again made by the respondent until its answer to the petition for rehearing (at F. R. 397) filed February 18, 1937 (F. R. 410). The hearing on petition for rehearing and the answer, resistance and motions with respect thereto was on *the same day* (F. R. 412). *The fact is that the 23-page answer containing the charge was actually filed at the*

"*The Special Master:* As the record now stands there is nothing for the Master to require the production of books."

Throughout this transcript, references are made to books and records both of Phoenix Finance System, Inc. and Phoenix Finance Corporation without any demand of counsel for their production, any request for any order to require production or any complaint as to non-production in pursuance of any order (see particularly Des Moines transcript pp. 301-302). At the Mason City, Iowa, hearings before the Master commencing July 22, 1935, similar references appear. It is significant that counsel made no effort to enforce production of books before the Master if, as contended, an order had been made and violated. It is equally significant, as pointed out in petitioner's principal brief (p. 50), that on January 5, 1935, the District Court overruled intervener's motion to strike petitioner's answer because of the alleged wilful disobedience and refusal of petitioner "to comply with the rules and order of this court for the production of books and papers * * *." (F. R. 106, 108.)

hearing and petitioner had no opportunity even to read the same until thereafter.

No evidence was produced by respondent to support this allegation. The trial court (Judge Scott) in denying the petition for rehearing (F. R. 412) apparently seized upon this unproved allegation *as a proven fact, entirely overlooking the scope of Judge Molyneaux's order of April 24, 1934, and the utter lack of any evidence to indicate noncompliance therewith by Phoenix Finance Corporation.* Evidence of confusion in the mind of the trial Judge, the Hon. George C. Scott, as to the scope and limitations of the order is to be found in the opinion denying petition for rehearing, wherein it is stated that "The interveners obtained an order of Court for the production of the books and records of the Phoenix Finance Corporation *before the Master* * * *" (F. R. 413). No such order was ever made.

At p. 27 of Respondent's Supplemental Brief, the absurd statement is made that "Petitioner had full opportunity to present anything it wanted to with respect to this pretended claim [i. e., its contention that it *did* produce books as ordered] on the *original hearing.*" How Phoenix Finance Corporation might be expected to prove its innocence of sin during a period when there was neither sin nor the charge of sin is not made clear. The *original hearing* to which reference is made was in July, 1935 (F. R. 115), after petitioner's previous exoneration on a charge of similar import (F. R. 106, 108, 109). The accusation was not again made until February 18, 1937, when respondent filed its answer to the petition for rehearing (F. R. 397-410) at the hearing held on the same day (F. R. 412).

The petitioner at all times since the damaging effect of this deception became apparent has nevertheless en-

deavored to prove *affirmatively* its full compliance with the order of April 24, 1934, although the burden of that issue was obviously upon the respondent and has never been met. At the trial of the supplemental and ancillary cause, petitioner sought, in support of its defense that the decree in the Foreclosure Cause was not a "right" one, to offer testimony to establish its position in this regard. The following is quoted from the Record (R. 275-277):

> "Mr. Morford: I would like to call John A. Thompson as a witness and have him sworn in this case.
>
> The Court: For what purpose?
>
> Mr. Morford: In connection with Mr. Thompson's testimony I desire to show the following: In the first place I wish to——
>
> The Court: You may state briefly the character of the testimony you desire to offer without going into a recitation of the testimony.
>
> Mr. Morford: In the first place I desire to make formal tender through John A. Thompson of all of the facts contained in the schedule of the testimony of John A. Thompson filed as an exhibit and schedule to the resistance of Phoenix Finance Corporation in this cause. With respect to those facts Your Honor refused Phoenix Finance Corporation the privilege of taking Mr. Thompson's deposition. We desire to offer his evidence with respect to those same facts, and all of those same facts, each and every part of his schedule of testimony.
>
> In addition we desire to offer the testimony of John A. Thompson to show that Phoenix Finance Corporation at all times complied with the order of Judge Molyneaux entered in this cause under date of April 24, 1934, and appearing in the printed record on pages 97 and 98, which order reads as follows: and I quote:

> 'Ordered that the defendant Phoenix Finance Corporation produce at its office in Des Moines, Iowa, all its books and records appertaining to the business and affairs of Iowa-Wisconsin Bridge Company, within ten days from the date of this order, and submit them to the inspection of the intervener and his counsel and accountant.'

In Your Honor's opinion dated March 4, 1937, as the same appears in the printed record, pages 410 to 413, Your Honor stated, and I quote:

> 'The interveners obtained an order of court for the production of the books and records——'

The Court: I don't think that we should take the time to read these matters into the record. You have sufficiently identified the subject upon which you desire to offer the testimony I would think.

Mr. Morford: Yes. In connection with that I can merely add that in view of the fact that Your Honor denied the petition for rehearing upon that ground we believe that we are entitled to show that there was at all times full and complete compliance by Phoenix Finance Corporation with the order of this court, and that assertion of fact which must have been taken by Your Honor from the various briefs and oral arguments of counsel, is not in accordance with the fact, and is not supported by the record. In other words, I do not want to take the position or have Your Honor think I am taking the position that I am saying Your Honor was wrong in a certain finding and therefore you should correct it. That is not my point. I say Your Honor made a certain finding of fact, and there is nothing in the record to support that finding of fact, and that the fact is the contrary, that Your Honor was imposed upon by fraud and misrepresentation on the part of counsel. We desire to direct Your Honor's attention to that fraud and to that end offer testimony to show that fact."

The Court would not permit the swearing of petitioner's witnesses (R. 258), and denied (R. 287) this and other offers of evidence by petitioner. Does this tender of sworn testimony indicate that petitioner is apprehensive of "running the risk of subjecting one of its officers to the charge of perjury" as respondent gratuitously suggests on p. 10 of its Supplemental Brief?

All of Respondent's references are either to the books of companies other than Phoenix Finance Corporation, for the production of which no order of any character was made at any time, or relate to requests for books made informally during the taking of evidence, without specific demand or court order and at times and places not comprehended in the order of April 24, 1934, or relate to similar informal requests made of witnesses who did not have the custody or control of the documents apparently desired.

This entire point is obviously featured by the respondent for the purpose of prejudicing petitioner. When the record is analyzed, it appears undisputably that *Phoenix Finance System, Inc.*, moved its general offices from Des Moines, Iowa, to Cleveland, Ohio, in 1929, and from thence to Florida in February, 1930 (F. R. 415, 613), where it went out of business in 1932 (F. R. 419). From the beginning and throughout this controversy, *Phoenix Finance Corporation* had its general offices and the office of its President, John A. Thompson, and its Secretary, M. K. Thompson, where the books were kept, in St. Petersburg, Florida (F. R. 545, 615, 636). It also had a loan office in Des Moines as well as in Minneapolis, Milwaukee (F. R. 440), and other cities. Therefore, when *Phoenix Finance Corporation was* ordered to produce *its books* at *its* office in Des Moines *during the ten day period* after April 24, 1934, it had to bring

its books from Florida to Iowa for that purpose. After being kept at the Des Moines office for a considerable period beyond that required by the order and being available throughout that period for any proper inspection by counsel for intervener, they were, no doubt, returned to the general offices in St. Petersburg, Florida. On the other hand, the books of *Phoenix Finance System, Inc.*, were at all times after the commencement of this action in Florida and were never ordered to be produced. Mr. English, the Vice-President at the Des Moines loan office of Phoenix Finance Corporation, obviously had nothing to do at any time with the general books either of Phoenix Finance Corporation or of Phoenix Finance System, Inc. (F. R. 613-616).

We have deemed it necessary to labor this point, perhaps at unnecessary length, because of the unjustifiable insinuations of respondent that Mr. Thompson in some manner and for some undisclosed purpose absconded with the books from Iowa to Florida in order to avoid compliance with the very limited order of April 24, 1934. *In conclusion, on this point it is significant that respondent does not contend and has made no assertion in any brief or argument that its counsel ever called at the offices of Phoenix Finance Corporation in Des Moines, Iowa, as provided in this order either between April 24 and May 4, 1934, or at any other time, and was refused access to any books of Phoenix Finance Corporation or was told that such books were not there.*

The fact findings in the Foreclosure Cause.

On pages 11 and 12 of Respondent's Supplemental Brief, petitioner is assailed for pointing to a finding with respect to the consideration for the underlying $50,000

mortgage as evidence of "successful legerdemain by counsel for respondent * * * without supporting evidence." Continuing, Respondent says (Supplemental Brief p. 12):

> "To say that in each case counsel for respondent secured a favorable decision without evidence and by sleight of hand is certainly impertinent and verges on contempt. If this assertion deserves notice by this Court, we cite the following record references:" (citing alleged references).

The petitioner reiterates that the references there cited do not support the finding, and such assertion is made with all solemnity and sincerity and with due deference to any thought to the contrary held by the Master, the District Court or by opposing counsel.

However, here again the Respondent evidences an utter lack of appreciation for petitioner's secondary or alternative position (Petitioner's Reply Brief pp. 4-5). The question, in this phase of the case, is not whether the record in the Foreclosure Cause supports the findings or any of them, but rather whether petitioner as the defendant below to a supplemental and ancillary bill of complaint to implement a judicial decree may defend against that decree as "wrong" by reason of the principle announced by this Court in *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552 at 561, that "*where a party returns to a Court of Chancery to obtain its aid in executing a former decree, it is at the risk of opening up that decree.*"

The Issue is One of Law and Not of Fact.

On p. 14 of Respondent's Supplemental Brief, Respondent refers to *findings of fact* by the District Court below that "all of the matters and items involved in the Delaware

actions and in the mortgage were involved in, fully litigated and determined" in the Foreclosure Cause, and that "unless petitioner was restrained by the court, the respondent (defendant) would be deprived of the fruits and advantages of the judgment, decrees and orders of the Court in this cause" and other supposed *fact findings* of similar import. With respect thereto, respondent says (p. 15):

> "The petitioner has wholly failed to show that any of such findings of the trial court are not supported by the record nor that the fact statements contained in the opinion of the Circuit Court of Appeals affirming the decree of permanent injunction are not fully supported by the record • • •."

The petitioner has felt throughout that respondent has wholly failed to comprehend the legal questions before this court. The foregoing makes that impression a certainty. Such findings are not *fact findings* but *conclusions of law*, and constitute the primary *legal* question in this Court. Petitioner's first Specification of Error is as follows (Petition for Writ of Certiorari p. 23):

> "1. That the Circuit Court of Appeals for the Eighth Circuit erred in holding that the decree of December 1, 1936 in the Foreclosure Cause constituted an adjudication against Phoenix Finance Corporation of the several issues and controversies in the Supplemental and Ancillary Cause."

The first *question of law* presented to this Court is stated in the following language (Petition for Writ of Certiorari p. 12):

> "1. Whether or not the decree of December 1, 1936 in the Foreclosure Cause constitutes an adjudication against Phoenix Finance Corporation of the several issues and controversies involved in the Supplemental

and Ancillary Proceedings, to wit, the five pending Delaware lawsuits, the $50,000 mortgage of record in Allamakee County, Iowa, and Crawford County, Wisconsin, and the $50,000 note for which the same is security."

Point II of Petitioner's Argument (Petitioner's Brief pp. 66-84) deals entirely with this question as one of law, and in Petitioner's Reply Brief (p. 4), the two basic questions are restated as follows:

(1) *Was the decree in the Foreclosure Cause such an adjudication against Phoenix Finance Corporation as to the issues in the several Delaware cases as to be entitled to "full faith and credit"?*

(2) *Assuming such adjudication, was Phoenix Finance Corporation as the defendant in a Supplemental and Ancillary Bill to implement and enlarge that decree, entitled to challenge the same as "wrong" under "Lord Redesdale's Rule"?*

It is inconceivable that the District Court or the Circuit Court of Appeals may decide a basic question of law and denominate it as a *finding of fact* in such manner as to deprive a petitioner of a review of that legal question in this Court.

The Issues in the Foreclosure Cause and Petitioner's Status Therein.

On p. 17 of Respondent's Supplemental Brief, it is stated that "All the claimed underlying considerations of Phoenix for bonds held by it (now involved in the Delaware actions and in the mortgage) *were put forward by the petitioner as claimed considerations for such bonds,* placed

in issue and investigated and litigated to the minutest detail and to the fullest extent * * *."

No statement could be further from a true appraisal of the facts. *Petitioner (Phoenix Finance Corporation) put nothing forward* and there were no issues as to it on any of these questions (see Petitioner's Brief pp. 10-14, 17-21, 66-83). In no event was it a party against whom an adjudication entitled to faith and credit could be made.

The Non-participation of Petitioner at the Foreclosure Trial.

In Respondent's Supplemental Brief at p. 29, it is stated that at a hearing in the Foreclosure Cause "intervener's counsel stated very pointedly, and in terms that could not be misunderstood, that the whole case was being tried and submitted." (Citing F. R. 694-695.) *However, the same record shows that Phoenix Finance Corporation (this petitioner) was not present at the hearing.* (See also F. R. 122.)

Continuing, Respondent says (p. 29) that "There was nothing to prevent the petitioner from bringing its books and the books of its predecessor and placing them in evidence, except its own unwillingness to do so." This assertion does not bear scrutiny when considered in the light of the facts stated in Petitioner's Brief under the heading "The 'Two-Stage' Theory of the Parties" (pp. 14-17), and the heading "The Non-Participation of Phoenix at the Trial" (pp. 17-21). The facts there given have never been successfully rebutted or contradicted.

Delaware Trials No Burden on Respondent.

Respondent's Supplemental Brief at p. 33 contains the argument that "To present this voluminous record in the

Delaware cases * * * would involve enormous expense * * *." No such burden has been apparent thus far. One case has been tried and determined (*Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Company*, 14 Atl. (2d) 386), and is pending on appeal (see Appendix to Petitioner's Brief). All the other cases would involve precisely the same record. Furthermore, although as pointed out (p. 33), a trial in Delaware is "over 1,000 miles away from where the Bridge Company's business and properties are located," nevertheless *Delaware is the voluntarily chosen domicile of the Respondent* and the place of its legal principal place of business.

The Alleged Control of Bridge Company by the So-called Phoenix Group.

This aspect of the matter (although conceived to be here immaterial) was stressed by petitioner in its Reply Brief (pp. 27-43) because of the persistent emphasis based upon incorrect facts appearing in Respondent's Brief. Again, in Respondent's Supplemental Brief (Appendix, pp. 47-53) appear statements of fact and implications that are wholly unwarranted from a consideration of the record. As to such facts, petitioner feels constrained to show this Court (if it be deemed pertinent) the true facts with the appropriate (and correct) record references. The following page numbers refer to statements in Respondent's Supplemental Brief:

(p. 47) Respondent states that in October and November, 1930, "the number of directors of the Bridge Company was increased and Thompson, *together with other directors in the Phoenix Finance System, Inc.*, became directors of the Bridge Company. From that time on, Thompson controlled the Bridge Company." This meeting was on November 1,

1930 (F. R. 861). Of the eleven directors (four of whom were elected at this meeting (F. R. 862)), *only J. A. Thompson and A. B. Wilder* were directors of Phoenix Finance System, Inc., or in any way connected with that Company. Wagner had no such connection (F. R. 265, 279, 290, 368, 674). Neither had Edward O'Conner (F. R. 265, 279, 343, 339, 368).

(pp. 47, 48) Respondent states that the November 11, 1930 meeting "was controlled by John A. Thompson and *his associates,* John W. Shaffer and Vernon W. O'Conner." F. R. 865-871, cited by respondent, shows conclusively that John A. Thompson did not control the meeting, did not vote and took no other part except to preside as chairman of the meeting. Furthermore, the cited record does not contain a scintilla of evidence that either John W. Shaffer or Vernon W. O'Conner were "associates" of Thompson, nor is there any other evidence in the record to establish such fact. Furthermore, this was an annual meeting of stockholders held in pursuance of notice to *all* stockholders (F. R. 865-871).

(p. 48) The first two grammatical paragraphs on this page can serve no purpose except to confuse the court. Respondent has attempted no refutation of the facts with respect to the November 26, 1930 meeting stated on pp. 34 and 35 of Petitioner's Reply Brief. *It remains undisputed that the so-called Phoenix group did not at the time of any meeting own a majority of the outstanding voting stock of the Bridge Company* (Petitioner's Reply Brief p. 32).

(p. 48) At the March 10, 1931 annual meeting of stockholders, held pursuant to notice to *all* stockholders (F. R. 893, there were outstanding and entitled to vote 3,651

shares (F. R. 311). Therefore, the 1,310 shares voted by Thompson did not represent corporate control.

(p. 49) Respondent persists in the characterization of Thorson as "a Thompson director" in spite of the conclusive record evidence to the contrary referred to at p. 37 *et seq.* of Petitioner's Reply Brief. Respondent's record references do not support the contention of respondent.

(p. 50) Again respondent insinuates that H. T. Wagner was an associate of John A. Thompson. As above shown, this is an unfair and incorrect implication (F. R. 265, 279, 290, 368, 674). F. R. 986-999 cited by respondent do not bear out the assertion that any of the persons named were "Thompson controlled directors." *Furthermore, the election of directors at the March 8, 1932 stockholders' meeting was the unanimous action of all stockholders present* (F. R. 998).

(pp. 50-51) Respondent says that a board of directors of Bridge Company "was selected by John A. Thompson at a stockholders' meeting held on July 8, 1933." This is utterly and deliberately false as counsel for respondent well knows (being himself present at the meeting; F. R. 1039). At this meeting, it appears that all the persons characterized by the respondent as "Thompson controlled directors" were defeated by a vote of 26 votes to 1,440 votes for the winning ticket, and 412 votes for a third ticket (F. R. 1041). J. A. Thompson ceased to be President after this meeting (F. R. 538). Furthermore, respondent's present contention as above quoted is opposed by the allegations contained in its answer to the bill for foreclosure, wherein this respondent stated and verified that (F. R. 65) —

"Par. 11. That the management of defendant corporation set out in Par. 9, by directors who were interested in the Phoenix Finance System, Inc. or its subsidiary organizations, remained on said board of directors *until the annual meeting held on the 8th day of July, 1933, when its present board of directors was elected; that* said corporation is now being operated at the lowest expense and cost it has operated at any time since the beginning of its operations; that an effort is being made by its present officers to re-finance outstanding accounts; that due to the fact these directors are stockholders and are interested in the organization they perhaps make a greater effort to refinance said organization than would some disinterested persons." (emphasis supplied)

(p. 52) The reference to A. M. Nystrom is inexplainable except for purpose of confusion in view of the fact that Mr. Nystrom never served as a director by participating in any meeting (Petitioner's Reply Brief, p. 40).

(pp. 52, 53) The statement that cancellation of $2,000 of the Wagner stock subscription was charged to "Expense—Cost of Bridge" is wholly untrue. This item, as shown by F. R. 1193, 1042, was charged to "Stocks and Bonds." The statement is made by respondent for the obvious purpose of reflecting upon Mr. Wagner and the then Bridge Company management. Furthermore, this stock subscription cancellation was in line with the policy of the Bridge Company at that time as evidenced by similar cancellations in other cases (particularly F. R. 1030).

REPLY TO RESPONDENT'S SUPPLEMENTAL ARGUMENT.

This case was assigned for reargument on May 26, 1941 (312 U. S. 670) following the affirmance by an equally divided court of the case of *Toucey v. New York Life Insurance Company* on April 7, 1941 (85 L. Ed. 745)[3] and the granting of rehearing thereon on April 28, 1941 (85 L. Ed. 846). The fact that the instant case was assigned both for argument and reargument *immediately following the Toucey* case lends support to the idea that comparable legal issues are thought by this Court to be common to both cases.

To the very limited extent involving a general consideration of the application of Section 265 of the Judicial Code, this is true. In both cases there were injunctional orders *against the party* to a state court action, and, as pointed out in Petitioner's Brief at p. 87, this offends against the Section to the same extent as an injunction formally directed against the state court itself.

> *Oklahoma Packing Company v. Oklahoma Gas & Electric Co.*, 309 U. S. 4.

Then too, in both cases the state court actions seek no relief "affecting the control, possession or disposition of the *res*."

> *Guardian Trust Co. v. Kansas City Southern Railway Co.* (C. C. A. 8), 171 Fed. 43, 50;
> *Equitable Life Assr. Society v. Wert*, 102 F. (2d) 10, 14.

However, in *Toucey v. New York Life Insurance Company* (C. C. A. 8), 102 F. (2d) 16, it appeared that *Mr.*

[3] No official report.

Toucey was the complainant in a Federal equity suit seeking as primary relief the reformation of a written instrument (p. 21). The reformation thus sought was predicated upon the alleged fraud of the defendant. If reformation had been granted, the complainant as necessary incidental relief would have been entitled to a money judgment for accrued disability benefits on the reformed instrument. The issue of fraud was litigated and decided adversely to Mr. Toucey.

Mr. Toucey (ignoring the colorable assignment to Shay) then commenced a state court action at law on the instrument *in the form it would have been had the Federal Court granted reformation.* That action was enjoined by the Federal Court in a supplemental proceeding on the ground that the adjudication against Toucey, the indispensable party complainant in the Federal equity suit, on the issue presented by the complainant in that suit, viz., the issue of fraud in the reduction in the amount of a policy of insurance, was binding upon the *same party* when he sought to litigate the *same issue* in a state court *against the same defendant.* In such cases, said the Court (p. 23), the Federal courts have "The power and duty * * * to effectuate their decrees and judgments and protect the fruits thereof * * *."

The distinction between the *Toucey* case and the case *sub judice* is apparent. As stated in Petitioner's Brief at pp. 87, 88—

> "The sole question here is: To what 'fruits or advantages' is the Bridge Company entitled? What rights were secured and what burdens were imposed by the final decree of December 1, 1936, in the Foreclosure Cause? Could an action *in rem* to impose a specific lien

on specific property bear fruits *in personam* beyond the issues and the parties indispensably in court? Did the Bridge Company litigate its indebtedness in a foreclosure suit in which its creditors were not indispensable parties? Did the 'fruits and advantages' of the decree in that suit, brought to establish a specific lien on specific bridge properties, by trustees who 'had exclusive control of the litigation' comprehend the stripping of Phoenix of its choses in action which were not a part of the *trust res*, and which the trustees did not hold, represent or control?"

However, in the *Toucey* case, the Eighth Circuit Court of Appeals, as a necessary part of the *ratio decidendi*, stated principles of law fully applicable to the facts of the instant case but not, for the reasons pointed out, applicable to the facts of the case there under consideration. Thus the Court in the *Toucey* case said (p. 19):

"It is well settled that 'where a bill states a case entitling the complainant to equitable relief, if the proof fails to establish the averments of the bill in that respect, the court is without jurisdiction to proceed further and determine rights that are cognizable in a court of law.' 21 C. J. 142. It is also the rule 'that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice." (citing authorities)

The illustration of the rule is where it is made to appear in an equity suit brought to foreclose a mortgage or other lien that there is in fact no valid lien enforceable in equity. In such cases, the equity court may not proceed to adjudicate a claim of legal liability upon

> *a promissory note or upon a purely legal obligation unrelated to equitable liens. In such cases, the legal controversy presented is dependent and distinct.''* (citing authorities; emphasis supplied)

The petitioner has carefully reviewed all additional authorities cited by respondent in its Supplemental Brief and has arrived at the considered opinion that this Court will not be aided by further analyses of cases or further discussions of legal abstractions. In nearly all instances the principles quoted by respondent cannot be controverted *when applied to their particular facts.*

It is respectfully submitted that the respondent has not answered petitioner's basic arguments or indicated any real appreciation of the facts of this case or the law as applied to those facts. Thus, as to petitioner's *primary* contention, respondent ignores the undisputed facts and applicable law (a) that the Foreclosure Cause was a proceeding *in rem* or *quasi in rem;* (b) that petitioner was *not* an "indispensable" party to that cause; (c) that the "representation" of petitioner by the Trustees-Complainants was limited of necessity to matters "relating to their common interest in the trust property," i. e., the enforcement of a lien upon real estate; (d) that there were no pleaded or justiciable issues in the Foreclosure Cause involving the underlying legal obligations of respondent to petitioner or any set-offs or legal counterclaims of respondent against petitioner; (e) that there was no prayer in the Foreclosure Cause justifying a decree of the scope and effect here claimed (*Federal Land Bank v. Jefferson,* Iowa 1941, 295 N. W. 855); (f) that as to the controversy involving 517 shares of Bridge Company preferred stock, the redelivery of which Phoenix is seeking in the Delaware Court of Chan-

cery, that Court has exclusive jurisdiction thereof as a matter involving the internal affairs of a Delaware corporation;[4] and, finally, (g) that the decree in the Foreclosure Cause was in legal effect (responsively to the pleadings and prayers) simply *a decree denying mortgage foreclosure.*

As to petitioner's *secondary* or *alternative* contention (the application to this case of the principle of "Lord Redesdale's Rule), the respondent fails to recognize that in such a case as this the equitable principles applicable to petitions for rehearing or the legal principles applicable to motions for new trial are not in point; that the foreclosure decree was in fact "complete and perfect" so far as concerns its sole and proper purpose, *the denial of foreclosure;* that as such it was self-executing and therefore incapable of further implementation; that the events happening after that decree, i. e., the institution of the Delaware actions and the recording of the $50,000 mortgage, were the basis of a *supplemental* bill seeking *supplemental* relief (Petitioner's Brief p. 101); and that in such case, the respondent having returned to the Court "to obtain its aid in executing a former decree," it was "at the risk of opening up such decree." Furthermore, at the expense of repetition but for the purpose of emphasis, it is again stated by petitioner that one of the points before this Court is petitioner's *right* on such a supplemental bill to challenge the former decree as *wrong.* What ultimate facts will appear is of no moment at this time.

> *"The point is that under 'Lord Redesdale's Rule' the defendant in the Supplemental and Ancillary Cause*

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[4] At no point in respondent's several briefs has any answering argument to this contention been made (see Petitioner's Brief pp. 80-84).

should have been permitted to show that the decree of December 1, 1936, was not 'right' ".[5]

The Court is advised that the decision of the Supreme Court of Delaware in *Iowa-Wisconsin Bridge Company v. Phoenix Finance Corporation,* No. 4 October Term 1940,[6] is still pending. In the event of a decision prior to the determination of this case, the petitioner will supply this Court with properly authenticated copies thereof.

It is respectfully submitted that the decree below be reversed.

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[5] From Petitioner's Brief pp. 54-55.
[6] In Superior Court, 14 Atl. (2d) 386; see Appendix, Petitioner's Brief.